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ALEXANDER L. STEVA
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No. 81-2245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF NEVADA,

Petitioner

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether water rights adjudicated by a federal court to a party (in this case, the United States) in an all-inclusive quiet title litigation are fixed inter se so as to provide res judicata protection to right holders in privity to that party.

2. Whether a federal court, as opposed to Congress, should change a time-honored doctrine developed by those state courts most intimately involved with water rights and hold that parties were not technically "adverse" to each other under the pleadings, even though the purpose of the litigation was to settle all rights to the water at issue.

LIST OF PARTIES

The Plaintiff-Appellant in the United States Court of Appeals for the Ninth Circuit was the United States of America. The Plaintiff-Intervenor-Appellant in the Ninth Circuit was the Pyramid Lake Paiute Tribe of Indians. The Defendants-Appellees in the Ninth Circuit were the Truckee-Carson Irrigation District, the State of Nevada, the Sierra Pacific Power Company, the City of Reno, Nevada, the City of Sparks, Nevada, the County of Washoe, Nevada, Albert A. Alcorn and approximately 17,000 other individually named persons, firms, partnerships and corporations located in the State of Nevada.* The Truckee-Carson Irrigation District appeared in its own right and as class representative of approximately 4,000 Newlands Project right holders. As discussed more fully below, the State of Nevada appeared in several capacities.

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* A list of the approximately 17,000 persons and entities, as it appeared before the Ninth Circuit, has been filed with the Clerk of this Court.

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OPINIONS BELOW

The Memorandum Decision, Findings of Fact and Conclusions of Law, and the Judgment of the United States District Court for the District of Nevada, all dated December 12, 1977, are not reported but are printed as Appendices E, F and H hereto.[1] The decision of the United States Court of Appeals for the Ninth Circuit from which certiorari is sought, dated June 15, 1981, affirming in part and reversing in part the decision of the District Court, is reported at 649 F.2d 1286 and

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[1] The District Court also entered an interlocutory decision, not at issue here, which was dated February 5, 1975, and which appears at 71 F.R.D. 10, holding, *inter alia*, that a separate trial would be held on the affirmative defenses of res judicata and collateral estoppel.

appears as Appendix I hereto. The two orders of the Ninth Circuit modifying the court's opinion, dated July 10, 1981, and January 5, 1982, respectively, are not reported but appear as Appendices J and K hereto. The order of the Ninth Circuit denying the petition for rehearing and the suggestion for rehearing en banc, dated March 11, 1982, is not reported but is printed as Appendix L hereto.

JURISDICTION

The Court of Appeals' decision herein was rendered on June 15, 1981 (App. 197a), and was modified by two orders dated July 10, 1981 (App. 254a), and January 5, 1982 (App. 256a). Petitioner State of Nevada filed a timely Petition for Rehearing on June 29, 1981. The Petition for Rehearing was denied on March 11, 1982 (App. 260a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION AND STATUTES

Section 8, Clause 3, of the United States Constitution reads in pertinent part: "The Congress shall have Power * * * To regulate Commerce * * * among the several States, and with the Indian Tribes * * *."

Although several United States statutes were cited in the decisions below, Petitioner does not specifically rely upon any of them in this Petition.

STATEMENT OF THE CASE

The facts surrounding this drawn-out proceeding can be briefly summarized, because most of them have been set forth in the opinion below.

The Truckee River is the life-blood to the largest population center in western Nevada. It originates in California from Lake Tahoe, winding its way through approximately twenty miles of that State and 65 miles

of the State of Nevada. It passes through the Nevada cities of Reno and Sparks, and terminates into Pyramid Lake. Part of its flow is diverted in Nevada through the Truckee Canal for the Newlands Project, the first federal reclamation project ever authorized by Congress and the first ever built.

Major settlement of western Nevada began with the discovery of the Comstock Lode at Virginia City in 1857. The Pyramid Lake Paiute Reservation was initiated by government action in 1859 and confirmed by an Executive Order issued by President Grant in 1874. By the early 1880's most of the farm land in the Truckee River Basin had been settled.

The Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, was passed by Congress on June 17, 1902, and fifteen days later the Secretary of the Interior withdrew the areas required for the Newlands Project. The fishery in the lower reaches of the Truckee River and Pyramid Lake had been declining for various reasons for a long period of time, but a marked decline occurred after the diversion of water from the Truckee River for the Newlands Project began in 1905.

In 1908, this Court rendered its historic decision in *Winters* v. *United States*, 207 U.S. 564 (1908), which established the reserved rights doctrine for Indian water rights. On March 3, 1913, the United States commenced a quiet title action in the United States District Court for the District of Nevada, known as *United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (*"Orr Ditch"*). The Government sought to quiet its title in *Winters* reserved rights for the Pyramid Lake Reservation as well as to adjudicate the water rights for the Newlands Project. The case went forward on the Amended Complaint of the United States which separately set forth the bases for the Pyramid Lake rights and the Newlands Project rights. The prayer of the Amended Complaint sought a determination of the relative rights of the

parties, including the United States, in respect to quantities, purposes, means of diversion and priorities (App. 1a, 10a-11a). The *Orr Ditch* case was intended by all concerned, including the lawyers, litigants and judges, to be a general all-inclusive water adjudication suit, which would avoid a multiplicity of suits, and to be a full and complete determination of Truckee River rights (see App. 145a, 185a, 201a-202a). In *Orr Ditch*, it was the intention of the United States to assert as large a water right as possible for the Indian Reservation, and obtain sufficient rights for the reclamation of thousands of acres of arid and otherwise useless land which was encompassed within the Newlands Project. The Pyramid Lake Tribe did not appear as an independent party in the case, but its interests were represented by the United States.

After the appointment of a Special Master in 1919, the taking of testimony in *Orr Ditch* continued for nearly two years. In the course of the presentation of its case, the United States filed a brief indicating that all the purposes for which a reservation had been withdrawn were before the court. By 1922, the Indians and all necessary officials of the Government, including the Attorney General's Office, the United States Attorney, the Bureau of Indian Affairs and the Department of Interior, knew that the use of water for the reclamation project was detrimental to the Pyramid Lake fishery.

After notice and opportunity to file objections and hearings, a temporary restraining order was entered by the Federal District Judge on February 13, 1926 (App. 12a). The order set forth the proposed water rights for all of the parties, but the proceedings were left open to test the decree and its application, and so that any person affected could apply for amendment, alteration or modification. *Winters* rights for irrigation purposes were awarded "for the United States and for the Indians belonging on said [Pyramid Lake] reservation and for

their use and benefit," but no *Winters* rights for fishery purposes were specifically sought or awarded (App. 13a-14a).

On December 18, 1926, a contract was entered into between the Truckee-Carson Irrigation District ("T.C.I.D.") and the United States whereby T.C.I.D. took over the management of the Newlands Project (see App. 186a). After that time and throughout the remainder of the *Orr Ditch* case, although the United States theoretically represented the interests of T.C.I.D., in actual practice T.C.I.D. was represented by its own counsel and, although never formally made a party, participated through its counsel in the proceeding that followed, and maintained an arm's length position vis-a-vis the United States. During this period the attention of the United States was focused upon the interests of the *Winters* rights for the Pyramid Lake Reservation.

By 1934, it had become apparent to the United States that it was in the interests of the Government and the protection of Indian rights that steps be taken to obtain a final decree. Negotiations went forward among the parties, including T.C.I.D., in an attempt to obtain a stipulation for a final decree. These negotiations led to the Truckee River Agreement, with T.C.I.D. as a party in its own right. The Secretary of the Interior approved the Truckee River Agreement on June 13, 1935 (see App. 186a-187a). The Agreement provided for a larger *Winters* water right for the Pyramid Lake Reservation than had been set forth in the temporary restraining order, but no specific right for fishery purposes.

The *Orr Ditch* Final Decree was entered on September 8, 1944 (App. 17a).[2] No appeal was ever taken from that Decree.

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[2] Part of the reason for the delay between 1935 and 1944 was the construction, following approval by Congress, of the Boca Dam in California, which provided additional storage of Truckee River water in accordance with the Truckee River Agreement.

Unlike all other rights set forth in the *Orr Ditch* Decree, the Pyramid Lake Reservation *Winters* right provides for water not only for historic uses, but for future uses. Thus, the Decree provides a water right senior to almost all other rights in the Decree to irrigate not only the land in cultivation on the Reservation, but all lands capable of irrigation (see App. 56a-58a, 75a-141a, 145a).

Since the entry of the *Orr Ditch* Final Decree in 1944, both the United States and the Tribe have continuously accepted and enjoyed the benefits of the water rights and priorities decreed and continue to accept and rely upon them. Neither the United States nor the Tribe has changed its position in any manner based on any assumption that the *Orr Ditch* Decree does not bind them or is in any way invalid (see App. 189a).

The whole civilization of western Nevada, including Reno, Sparks, and all other Truckee watershed areas and the vast agricultural enterprises at the Newlands Project have been built in reliance on this water Decree. The entire region has thus continued to rely upon it (see App. 189a).

In September 1972, the United States filed in this Court a Motion for Leave to File Complaint (*United States* v. *Nevada*, Original No. 59), in an attempt to establish a *Winters* right for fishery purposes for the Pyramid Lake Reservation. This Court declined to exercise its original jurisdiction. 412 U.S. 534 (1973).

Thereafter, in December 1973, the United States filed its Complaint in the instant action in the United States District Court for the District of Nevada. *United States* v. *Truckee-Carson Irrigation District* (App. 151a). The Complaint sought a *Winters* right for fishery purposes on behalf of the Pyramid Lake Tribe, and also sought the adjudication of additional water rights in favor of

the United States in its proprietary capacity. The Pyramid Lake Tribe was granted leave to file a Complaint in Intervention seeking also an adjudication of a *Winters* rights for fishery purposes. The District Court bifurcated the case to determine whether the approximately 17,000 defendants were entitled to the application of res judicata as a bar to the two Complaints. On December 2, 1977, after 43 days of trial, the Hon. J. Blaine Anderson, a Judge of the Ninth Circuit Court of Appeals sitting by designation, ruled that *Orr Ditch* had settled all rights at issue and that therefor res judicata was a defense available to all defendants, including T.C.I.D., and was a bar to the *Winters* fishery rights claims now being asserted by the United States and the Tribe (App. 161a, 180a).

On June 15, 1981,[3] the Ninth Circuit Court of Appeals affirmed in part and reversed in part, holding that all the defendants *except* T.C.I.D. were entitled to rely upon res judicata (App. 197a). The majority reasoned that because the United States had not expressly pleaded in its *Orr Ditch* Amended Complaint that the Pyramid Lake Reservation rights and the Reclamation Project rights would be fixed inter se, the interests of the Tribe and T.C.I.D. had not been "adverse" in the *Orr Ditch* case. Therefore, ruled the court, the adversity requirement of res judicata was not met. On remand, the District Court was to determine whether a fishery right exists and, if so, the court was to satisfy the requirements of that right from water adjudicated for the benefit of the Reclamation Project.

Circuit Judge Schroeder dissented from that part of the majority's opinion which refused to apply res judicata to T.C.I.D. (App. 249a). She pointed out that the

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[3] The opinion was subsequently amended by orders dated July 10, 1981 (App. 254a), and January 5, 1982 (App. 256a).

majority's technical application of "adversity" requirements based on the pleadings is more applicable to tort litigation than to water rights. She noted several decisions by state courts in the West indicating that in all-inclusive quiet title litigation, because only a limited amount of water is available for distribution, the interests of *all* parties, however designated in pleadings, are necessarily "adverse" to each other. Congress has been alerted to these problems, she added, and if any change in the long-standing principle of finality in water adjudication is to be effected, it should be accomplished by Congress rather than the federal courts.

Petitions for rehearing by the State of Nevada and T.C.I.D. were denied by a vote of two to one of the three-judge panel of the Ninth Circuit Court of Appeals on March 11, 1982, and in the same order a majority of all active judges voted against an en banc rehearing (App. 260a).

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioner raised and argued the issues relating to whether T.C.I.D. was entitled to rely upon res judicata before both the District Court and the Court of Appeals (see, *e.g*, Brief of Appellee State of Nevada in the Ninth Circuit, pp. 45-47), and both courts specifically passed on these issues (App. 186a-192a, 199a, 240a-246a, 248a).

BASIS FOR FEDERAL JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Court of Appeals' determination that in this suit brought by the United States in federal court under 28 U.S.C. § 1345, T.C.I.D. may not rely upon the doctrine of res judicata.

ARGUMENT

Although the Court of Appeals held that the State of Nevada, like the other "Orr Ditch defendants," could assert res judicata under the *Orr Ditch* decree, the State has a number of interests to protect. It acts in its quasi-sovereign capacity to protect the over-all interests of all the people and entities in the State. As such, the State believes that the Court of Appeals was in error in failing to allow T.C.I.D. to take advantage of the doctrine of res judicata, and that the result of a remand reopening the issue of water priorities as between the Tribe and T.C.I.D. will be detrimental to the State as a whole. Thus, it is in its quasi-sovereign capacity that the State appears as a Petitioner in this Court.[4]

The State respectfully submits that this Court should grant the writ of certiorari because the issues presented are ones that should be settled so that the finality of water decrees and other quiet title actions in the federal courts—including those in which the United States has appeared—are not open to doubt, question or relitigation. The stability of property rights in the West and throughout the country should not be jeopardized by a dependency on pleading practices which are outmoded and which, even if they still apply to other forms of litigation, are not suitable to lawsuits involving efforts finally to quiet title to water rights. The form-over-substance approach of the Ninth Circuit is, as the dissenter below noted, a serious one which may now be made applicable to water adjudications generally.

1. The Ninth Circuit Has Upset Prior Case Law by Allowing the Relitigation of Rights Finally Established by A Decree Binding on All Parties and Their Privies.

The majority of the Ninth Circuit panel was obviously troubled by the fact that the United States had multiple

[4] The State pointed out to the courts below that it could choose at any juncture of the case to act in its quasi-sovereign capacity. *E.g.*, Record on Appeal Before the Ninth Circuit, p. 1959.

interests to represent in the *Orr Ditch* litigation. But a sovereign often finds itself in the position of acting on behalf of particular federal interests and on behalf of the nation as a whole. The need to adjudicate federal interests in multiple capacities is hardly unique. In fact, not only did the United States represent the proprietary interests of the Indian Tribe in the *Orr Ditch* case, but again in the case at bar, the United States is suing as a fiduciary and also seeking the adjudication of competing water rights for federal proprietary interests. The United States' Complaint in the case at bar, just as in *Orr Ditch*, also fails to satisfy the Ninth Circuit requirement that if the federal rights to be adjudicated pursuant to a quiet title complaint are to be determined inter se, the Complaint must so indicate.

Justice Holmes, writing for this Court in *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904), set forth the settled rule of law that when the United States brings a quiet title action, it must do so in all of its capacities or be bound by res judicata on any other claim within the same cause of action. The Ninth Circuit has reopened the once settled rights adjudicated to the United States, so that the generations of people who have made their homes within the Newlands Project and developed their lands in reliance on the rights litigated for the project in the *Orr Ditch* decree now stand to lose the basis of their existence.

The Ninth Circuit rationale would attempt to justify this overwhelming hardship by stating that ancestors of those originally farming the Newlands Project should not have relied on the representation of the United States alone to fix the rights sought in the Government's Complaint. This rationale is in contradiction to the leading case which forms the basis for representative litigation by the United States on behalf of Indian interests. *Heckman* v. *United States*, 224 U.S. 413 (1912), made clear that when the United States litigates on behalf of its Indian wards, that representation is complete, and

those who litigate with the United States can do so with the assurance that the outcome of the litigation will not be subject to a subsequent attack in connection with the same cause of action. The people of the Newlands Project are the successors in interest to the United States in the *Orr Ditch* litigation in respect to the Reclamation Project. The relationship of privity should afford *Heckman* protection, as opposed to singling out those who appeared in their own right and those who did not.

The policy against reopening water adjudications applies with particular force on a fully appropriated river, such as the Truckee, when federal reserved rights have been quantified. As this Court recognized in *United States* v. *State of New Mexico*, 438 U.S. 696, 705 (1978), "[w]hen * * * a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators."

However, the implications of what the Ninth Circuit has ruled go far beyond the rights to water in the Truckee River, the rights to any fully appropriated river, or any of the other circumstances present in this particular case. The ruling can be applied in *any* water proceeding in which a litigant seeks adjudication of multiple rights. The case thus becomes one of unique importance in a field of law that is of vital—in fact, life-giving—importance in vast areas of our country.

2. The Panel, by Misconceiving the Nature of "Adversity" in Water Rights Litigation, Has Seriously Eroded the Purpose of Such Litigation and Has Usurped the Role of Congress.

Judge Schroeder, in dissent, squarely pinpointed both the seriousness of the panel's decision and its fatal flaws. The seriousness arises out of the fact that the decision neither purports to, nor logically should, relate only to the particular facts of this case. The panel announced a general rule that presumably can be applied to all water

rights adjudications—namely, that before res judicata can be relied upon, it must be shown that there was "adversity" between the interests of the parties in the prior litigation, and the way one determines adversity is to look to the pleadings to determine how those parties and interests were denominated. Such a rule may well result in the reopening of literally hundreds of lawsuits that were thought to be finally disposed of, with thousands of owners of water rights finding their homes, lands, crops and cattle in sudden jeopardy.[5]

The panel was wrong not only because this technical reliance upon the happenstance of how a party is "named" belongs to both another era and to other types of litigation, but because it overlooks the true nature of lawsuits designed to quiet title to water rights. A party can be a plaintiff, defendant, intervenor, or any other type of participant, but if there is only a limited amount of water to be awarded, the interest of each party is necessarily "adverse" to the interest of every other party.

Judge Schroeder noted several Idaho and Nevada state cases in which every claimant was assumed to be adverse to all others who had claims to the same water. We respectfully call the Court's attention to 88 A.L.R. 444-446 (1934), which cites cases from the state courts of California, Oregon and Wyoming where the same principle was applied in determining whether nonappealing parties were "adverse" parties in water rights cases. As one court succinctly put it: "* * * the very essence of any decree in such [water] litigation is the determination of the relative rights of the parties. This element of each right being relative to all others persists from the beginning to the end of such litigation, so that the plaint of one party must affect all others in a greater or less degree." *In re Chewaucan River*, 89 Ore. 659, 171 Pac.

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[5] The fact that there were approximately 17,000 named defendants in this case alone demonstrates that this assumption is not overstated.

402, 403-404, *appeal dismissed*, 89 Ore. 668, 175 Pac. 421 (1918).

Finally, as the dissent also pointed out, if this time-honored principle—developed by those Western state courts which must deal every day with problems of water rights adjudication—is now to be amended in a fashion that erodes finality, surely that amendment should be carried out by an act of Congress rather than by a federal Court of Appeals. This is particularly true where the matter has been specifically drawn to the attention of Congress, which has chosen to date not to act (see App. 252a-253a).

CONCLUSION

For each of the reasons above, Petitioner State of Nevada respectfully requests the Court to grant the writ and reverse the decision of the court below.

Respectfully submitted,

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